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Supreme Court of the United States

OCTOBER TERM, 1943

No. 265

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MEDO PHOTO SUPPLY CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF FOR MEDO PHOTO SUPPLY CORPORATION.

The arguments in the respondent's brief proceed on the assumption that it is immaterial that the employees decided to negotiate and did negotiate with the petitioner of their own free will and not at the suggestion or instigation of the petitioner (Br. 27).

The respondent takes the position that this premise is "almost too clear for argument" (Br. 27), and in support cites cases in which the employer either discriminated against the employees because of their union affiliation, or engaged in espionage activities, or approached the employees during bargaining negotiations with offers of various inducements to undermine the union (Br. 28, 29).

Not a single case is mentioned adjudging it to be an unfair labor practice for an employer to accept an offer made voluntarily by a majority of the employees to repudiate a representative theretofore selected on condition that the employer increase wages. Research by the petitioner's counsel has revealed only one authority in point, *N. L. R. B.* v. *Bradford Machine Tool Co.*, 138 Fed. (2d) 246 (C. C. A.

6). That case is discussed on page 14 of the petitioner's main brief. The respondent has ignored it completely. In that case the Board found that a course of conduct similar to that in the instant case was a violation of the Act, but the Circuit Court of Appeals overruled the Board, holding that the employee's conduct was not an unfair labor practice.

The respondent does not dispute that the purpose of the Act is to permit employees to make their own decisions as to their bargaining representatives, who may be the employees themselves (N. L. R. A. §2 [4]), in order to lessen industrial strife and establish stable and harmonious industrial relations (Br. 24, 25). That purpose was achieved and that result accomplished in the instant case by the negotiations initiated by the petitioner's employees. Almost three years have passed since the employees approached the petitioner with their proposal and negotiated an agreement satisfactory to them, and since then there has not been a single complaint by any employee. The importance of maintaining this relationship, which has proved to be wholly satisfactory to both employer and employees, cannot be minimized. Yet the respondent chooses to ignore it.

By granting the wage increases the petitioner did not dictate to its employees, as stated by the respondent (Br. 24), but merely acceded to their wishes. The petitioner did not dictate or influence the determination and desire of its employees to deal directly with the petitioner rather than through the Union (R. 85, 86, 89, 114, 118, 139, 176-180, 290, 306, 308). That decision was arrived at by the employees entirely of their own accord for the reasons stated in the petitioner's main brief (Petitioner's Br. 4, 5, 10, 15). The petitioner had no inkling of its employees' dissatisfaction with the Union until the meeting of June 7th, when twelve employees, representing that they spoke for the eighteen who had signed the Union's application cards, informed Manager Hoppin thereof (R. 177-180).

The respondent's statement that only four of the eighteen employees repudiated the Union (Br. 12, fn. 14; 30 fn. 23) is not supported by the record. These four employees, comprising the employees' negotiating committee, informed the Union on June 9th that they and their fellow employees had decided that they no longer wished the Union to represent them (R. 62, 118, 124, 125). That all the employees rejected the Union is borne out by the fact that thereafter all of them refused to have any further dealings with the Union (R. 59). Neither the Board's decision nor the decision of the Circuit Court of Appeals is based upon the unrealistic ground that only four and not all of the employees revoked the Union's representation.

The sole issue in this case is whether the employees had the right to change their minds about the Union and deal directly with their employer, and whether the petitioner was guilty of an unfair labor practice in accepting its employees' proposal, submitted by them freely and voluntarily without any influence, inducement or suggestion by the petitioner.

The ultimate purpose of the Act is effectuated where harmonious labor relations are established through negotiations conducted in a manner freely selected by the employees. The record shows that this procedure was followed in the instant case, and that thereby the salutary purpose of the Act was achieved.

It is, therefore, respectfully submitted that the decree of the court below should be reserved, the Board's order set aside and its complaint dismissed.

Respectfully submitted,

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William E. Friedman,
Attorneys for Medo Photo Supply Corporation.

February, 1944.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 265

MEDO PHOTO SUPPLY CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The majority and concurring opinions of the court below (R. 304–307, 308–310) are reported in 135 F. (2d) 279. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 275–295) are reported in 43 N. L. R. B. 989.

JURISDICTION

The decree of the court below (R. 311–312) was entered on May 21, 1943. The petition for a writ

of certiorari was filed on August 16, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

The Board found that petitioner, after recognizing the statutory status of the Union[1] on June 5 as the exclusive bargaining agent of its employees in an appropriate unit, and pending the scheduled opening of collective bargaining on June 9, engaged in direct dealings with employees in the said unit and granted them a wage increase in acceptance of their offer to repudiate the Union, conditioned upon the granting of such increase. It found further that petitioner thereafter refused to bargain with the Union on the ground that the Union had consequently lost its representative status. The sole question presented is whether, upon these findings, the Board properly concluded that petitioner had violated Section 8 (1) and (5) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 11–13.

[1] Photo Employees Union, Local 21314, affiliated with the American Federation of Labor.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 275–295). The facts, as found by the Board and shown by the evidence, may be summarized as follows:[2]

On June 4 and 5, 1941, about two weeks after eighteen of the twenty-six employees in petitioner's shipping and receiving department had designated the Union as their bargaining agent, conferences were held by representatives of the Union, of the National Labor Relations Board, and of petitioner, in which petitioner at first questioned the appropriateness of the shipping and receiving department as a bargaining unit, but finally waived a formal determination by the Board and agreed to negotiate with the Union for the unit claimed without further proceedings. A proposed contract was submitted by the Union, and it was agreed that petitioner would meet with the Union on June 9 to begin collective bargaining. (R. 280–285; 20–26, 228–229.)

On June 7, it was decided by some of the Union members that they would ask for a wage increase directly instead of through the Union, but that they would continue their Union membership if their request were refused (R. 285; 109, 122–123).

[2] In the following statement, the references preceding the semicolons are to the Board's findings; the succeeding references are to the supporting evidence.

That afternoon, a group of twelve Union employees visited Manager Hoppin, submitted a proposed wage scale substantially the same as that already submitted by the Union, and stated that they and the six other Union members had no desire to belong to the Union if they could obtain a wage increase directly (R. 285; 231–232, 83–85, 106, 115–116, 78). On June 9, their proposal was accepted with slight modifications, and, upon being so advised, they informed Mr. Hoppin the same morning "that they did not need the Union, and * * * would rather stay out" (R. 285–286; 98–99, 101–102).

Later in the day, en route to the scheduled collective bargaining conference, the four members of the bargaining committee told the Union agent that the employees no longer wanted the Union to represent them (R. 287; 30–31, 124). At the conference, petitioner announced that it could not bargain with the Union because it no longer represented a majority, but that if the Union could prove otherwise by an election, it would see what could be done; the four employees present again stated that they no longer wished to remain members of the Union, and the meeting ended (R. 287; 31–32, 161, 174).

Upon the foregoing facts, the Board concluded that petitioner had engaged in unfair labor practices which the meaning of Section 8 (1) and (5) of the Act and entered its order requiring peti-

tioner to cease and desist from its violations of the Act, to bargain collectively with the Union, and to post appropriate notices (R. 293–295).

On November 17, 1942, the Board filed its petition for enforcement in the court below and on April 28, 1943, the court handed down its opinion enforcing the Board's order (R. 304–307). Judge Learned Hand concurred in a separate opinion (R. 308–310). A decree enforcing the Board's order was accordingly entered on May 21 (R. 311–312).

ARGUMENT

1. Upon the evidence summarized above, the court sustained the Board's findings of fact, (a) that on June 5, petitioner recognized the Union's statutory status as the exclusive representative for purposes of collective bargaining of the employees in an appropriate unit (R. 287–288, 306), and (b) that, between then and June 9, petitioner accepted, in direct dealings with its employees, their offer to withdraw from the Union in return for an increase in pay (R. 288–289, 306, 309). The finding that petitioner thereafter refused to bargain with the Union on the ground that the latter had consequently lost its representative status, was not disputed. Upon these findings, the court properly upheld the Board's conclusions that petitioner had violated Section 8 (1) and (5) of the Act.

As has been said by this Court (*National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332,

342), a major purpose of the National Labor Relations Act is to require collective bargaining, between the employer and the duly designated representative of its employees, "to the end that employment contracts binding on both parties should be made." In the instant case, while under the duty to bargain collectively toward this end and while under express commitment to begin collective bargaining negotiations within a few days, petitioner negotiated and entered into an arrangement which, if legal, would ensure the elimination of the designated representative and would effectively bar the achievement of one of the statute's objectives—a binding collective agreement. In the face of a formal request by the Union for a contract fixing specified rates of pay, petitioner dealt directly with the Union's constituents and granted them equivalent wage increases in the form of a unilaterally revocable management schedule, at the price of the repudiation of the Union. "To permit the employer [thus] to go behind the chosen agent and negotiate with the employees" for their abandonment of collective bargaining would clearly "result in nothing but disarrangement of the mechanism for negotiation created by the Act * * *." *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2). Furthermore, since the employer's duty is to "keep his hands off completely and exert no influence over his em-

ployees, directly or indirectly" in their decisions concerning self-organization (*National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. (2d) 295, 301 (C. C. A. 6)), the Board correctly held that, whether petitioner or the group of employees was the source of the original impulse to deal directly, petitioner's acceptance of the offer to abandon the Union for a price, and its delivery of the *quid pro quo* on the morning of the day when collective negotiations were scheduled to begin, were in violation of its obligations under the Act (R. 288–290). Cf. *National Labor Relations Board* v. *Highland Shoe, Inc.*, 119 F. (2d) 218, 221 (C. C. A. 1). Petitioner having thus participated in the undermining of the Union's representative status, it was, by settled authority, not entitled to assert its success as a ground for withdrawing its recognition of the Union and refusing to bargain collectively. *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 339–340; *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81–82; *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512; *National Labor Relations Board* v. *Franks Bros. Co.*, decided July 27, 1943 (C. C. A. 1).

This is not to say that once the opportunity for an uninfluenced choice is restored by good-faith compliance with the Board's order and the passage of a reasonable period of time, the em-

ployees must continue to accept the Union as their representative, if they do not so desire. Sections 9 and 10 of the Act provide adequate machinery for the determination of representation "after unfair labor practices have been removed as obstacles to the employees' full freedom of choice." *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 83.

2. The decision of the court below presents no conflict with the decisions of other courts, and petitioner therefore relies (Pet. 8–11) heavily upon asserted conflicts in the opinion of the Board, the opinion of the majority of the court sustaining the Board's order, and the concurring opinion of Judge Hand. This is not a conflict within the enumeration of Rule 38, par. 5 (b).

There is, moreover, no conflict at all on the only question at issue in this proceeding, *i. e.*, whether the Board's order is appropriate upon findings supported by the evidence. On this question, the opinions are agreed. The majority opinion notes, as an additional consideration justifying the Board's disregard of whether the conditional offer originated with petitioner or the group of employees, that a rule making origin the touchstone of illegality would hamper effective administration of the Act because of ease in evasion and difficulty in proof (R. 307). Judge Hand, rejecting this portion of the majority's reasoning (R. 308), agrees that in the instant case, the Board

properly disregarded the origin of the offer, because, whatever its source, the offer was inconsistent "with the pervasive purposes which the preamble [Section 1 of the Act, Appendix, *infra*, pp. 11–12] of the statute discloses" (R. 309–310). Contrary to the implications of petitioner's argument (Pet. 9–11), this basis for sustaining the Board's decision is not incompatible with Judge Frank's opinion, which expressly holds that the Board could properly find "the acceptance of *such an offer*[3] [to be] an unfair labor practice" (R. 306). [Italics supplied.]

Even, however, if we were to assume that the three opinions have no common ground at all, there would still be no basis for the contention that such inconsistencies, "if not clarified, [would] only lead to confusion" and that the issuance of the writ would therefore be warranted (Pet. 11). It is elementary that in such a situation the decision of the majority of the court controls the law for the circuit.

3. The decision below expressly turns on the particular facts of the case and presents no substantial question of general importance (R. 306):

> It is unnecessary for us [the majority of the court] to consider whether, when employees have once selected a bargaining representative, and especially when there has

[3] "Such an offer" refers to the offer made by the twelve employees to repudiate their bargaining representative on condition that petitioner would increase their wages.

> been no certification by the Board or an election, a majority of the employees may then, by informal action, repudiate that representative and bargain directly with the employer. Nor need we consider whether, as an invariable rule, it is an unfair labor practice for an employer to accept an offer made by a majority of the employees to repudiate a representative theretofore selected on condition that the employer will increase wages. It is enough to hold, and we do hold, that it was within the power of the Board to find that, *in this particular case,* acceptance of such an offer was an unfair labor practice. [Italics supplied.]

CONCLUSION

The decision below is correct and presents no conflict of decisions or question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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SEPTEMBER 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

> SEC. 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and

by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

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